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80-101

No. 80-

IN THE

Supreme Court of the United States

October Term 1980

JAMES HENRY SMITH,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

TIMOTHY K. FORD
DANIEL HOYT SMITH
2200 Smith Tower
Seattle, Washington 98104
Telephone: (206) 622-5942

CHARLES S. SIMS
American Civil Liberties
Union Foundation
132 West 43d Street
New York, New York 10036
Telephone: (212) 944-9800
Attorneys for Petitioner

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Petitioner hereby submits the following Reply to Respondent's Brief in Opposition:

1. The Court should not be misled by Respondent's attempt, through new counsel, to inject imagined procedural problems into this case at this late date. The question of home privacy set out in the petition is squarely and properly presented here.

a. Respondent's assertion that "no Fourth Amendment issue was raised or decided in the state courts below" (Resp. Br. at 4) is

incredible. In all petitioner's briefs and arguments, the issue was stated in Fourth Amendment terms:

> "the private home . . . [i]s a place which cannot be unreasonably searched or invaded by the government (U.S. Const. Amendment 4; Washington Const. Art.1 sec 7), a place where an individual may engage without restriction in purely private actions which might constitutionally be precluded elsewhere. See Stanley v. Georgia, supra; Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Ravin v. State, 537 P.2d 494, 503 (Alaska 1975)."

Def's Prelim. Memo. at 7, CP 143.

> "most importantly--'the Constitution extends special safeguards to the privacy of the home.' United States v. Orito, 413 U.S. 139, 142, 37 L. Ed.2d 513, 93 S.Ct. 2674 (1973). The Fourth Amendment explicitly recognizes the 'right of the people to be secure in their . . . houses,' . . . ."

Def's Third Memo at 11; App. Br. at 34. See also, e.g., Def. Third Memo at 8-9; RP 1079-83; App. Br. 32; App. Rep. Br. at 6.

Whenever any question of the nature of this claim was raised, it was made clear:

> "This is very much a search and seizure issue. This is the issue of whether the state can search and seize people's homes to get this substance . . . .

RP 76 (defense counsel argument).

> "[T]he Fourth Amendment . . . lies at the heart of the privacy claim advanced both here and below. . . . The Fourth Amendment requires more than just that proper procedures be followed before citizens' homes and lives are invaded. It requires that the invasion serve 'some governmental interest which is adequate to justify the imposition on the liberty of the individual.'. . . In a sense the issue in this case is one of pure Fourth Amendment law: whether the invasion of the Smith home was 'reasonable' . . . . That is the question in this case: whether RCW 69.50.401(c) is constitutional "as applied" (RB 1) to private marijuana possession in the home."

App. Reply Br. at 6.

It is exactly this argument--that the marijuana laws "are unconstitutional as applied to possession of marijuana for personal use in one's home," and "enforcement of these statutes under the above circumstances invades a right to privacy," State v. Smith, 93 Wn.2d 329, 345-6 (1980) --the court below rejected, by holding no separate right to privacy in the home exists. That holding squarely raises the question presented by this petition.

b. Respondent's suggestion petitioner's backyard greenhouse may have been outside "the curtilage of the defendant's home" (Resp. Brief at 5), was never made below. The accuracy and sufficiency of the factual premise that the "activity . . . was confined to areas in and around [petitioner's] private residence," State v. Smith, supra at 93 Wn.2d 332, has never before been questioned. The record contains no evidence or finding doubting the domestic character of the backyard greenhouse, or distinguishing it or the marijuana found in it from the rest of petitioner's property. Nor does the record show whether the amount of marijuana taken from that greenhouse could, alone, support petitioner's felony conviction. Respondent's attempt to factually subdivide the Smith residence and exclude part of it from the protection of the constitution is meritless and untimely, and should not be permitted to obscure the issue here.

2. Petitioner "has not contested the findings of the Washington Supreme Court concerning the dangerousness of marijuana" (Resp. Br. at 12), because no such findings underlay that court's declaration that the right to privacy does not "extend" to the private use of marijuana. See Petition at 19. If this Court reviews this case and holds the right to privacy in the home does have general application, it will remain to be decided, here or on remand, whether the transitory effects of marijuana use justify invasion of that right.

Respectfully submitted,

Timothy K. Ford
Daniel Hoyt Smith
2200 Smith Tower
Seattle, Washington

Charles S. Sims
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 W. 43d Street
New York, N.Y. 10036

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